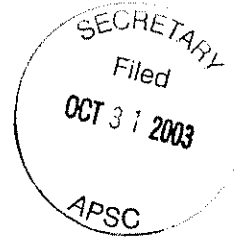
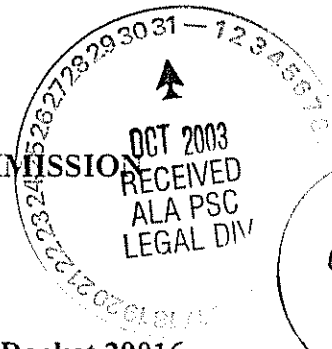


Before the  
ALABAMA PUBLIC SERVICE COMMISSION

Petition For Declaratory Relief Regarding )  
Classification Of Phone-To-Phone )  
IP Telephony Service )

Docket 29016



**COMMENTS OF NET2PHONE, INC.**

Please accept these comments on behalf of Net2Phone, Inc. ("Net2Phone") in response to the Alabama Public Service Commission's ("Commission") Order Establishing Declaratory Proceeding related to classification of phone-to-phone IP telephony services, ("IP telephony or VOIP").<sup>1</sup> Net2Phone applauds the Commission's timely review of these emerging technologies and welcomes this opportunity to provide the Commission with information regarding the benefits of VOIP.

**Summary**

Net2Phone submits that: (1) VOIP services are information services that do not fall within the Commission's definition of "transportation companies" within the meaning Alabama Code §37-2-1; (2) providers of IP telephony services are not subject to APSC rules applicable to the provision of traditional telephone service, including the filing of tariffs; (3) Providers of IP telephony services are exempt from payment of access charges for the origination and termination of traffic, (4) the Commission's jurisdiction over VOIP may be subject to preemption by federal law; and (5) significant public reasons exist for the Commission to refrain from regulating VOIP providers at this time.

<sup>1</sup> *In Re Petition for a Declaratory Order Regarding classification of IP Telephony Service*, Public Service Commission Order Establishing Declaratory Proceeding, Docket 29016, August 29, 2003

## **General Description of VOIP**

The development of Internet Protocol (“IP”) technologies has now made it possible to provide voice and data over the same line, created more competition, and reduced rates for the benefit of consumers. This, however, is only the beginning to the benefits of this emerging technology.

VOIP uses innovative technologies that are fundamentally different from circuit switched services such as Plain Old Telephone Service (“POTS”). Rather than transmitting calls through a dedicated circuit-switched path, VOIP involves the provision of a voice application utilizing IP. In the traditional circuit switched environment, when a call is made, the local loop remains dedicated to the customer for the duration of the communication. This reserved connection becomes free only when the parties terminate the call and break the connection. This outdated circuit-switched technology utilizes the telephone lines in an inefficient manner as compared to voice transmitted over Internet Protocol. Transmission Control Protocol, Internet Protocol (“TCP/IP”) is a set of rules that facilitates the communication of data among computers operating on a wide variety of networks with differing hardware configurations. The communication transmission itself travels over Internet “gateways.” Gateways are computers that transform the communication signals into IP packets and perform associated signaling, control, and address translation functions. Basically, IP voice communications are provided by compressing voice signals, packetizing them, storing data associated with those signals, adding various protocols to the signals, and then reassembling and decompressing the signals at their ultimate destination. Once the voice signal is changed into packets, each

packet travels independently across different Internet paths of the network rather than as an intact signal over a single predetermined route in the circuit-switched environment.

This capability to converse contemporaneously, coupled with the installation of private Internet networks that do not have to compete with the crowded public Internet, has practically alleviated sound quality problems and markedly improved Internet telephony technology since its recent creation. By providing each of these functions – information processing, data storage, and protocol conversion—IP voice applications are not classified as telecommunications, but rather as enhanced or information services.

At its outset, IP telephony was generally offered in limited form where end users could only make calls through their computers. The rapid innovation of gateway technologies has, however, led to the construction of enough gateways to eliminate the need for a PC in IP telephony communications. IP telephony can now be offered in a variety of ways and service configurations for the convenience of consumers and the benefit of competition.

### **VOIP Services Are Classified as Information Services**

While the Petitioning Incumbent Local Exchange Carriers (“ILECs”) attempt to gloss over federal law by dismissing it in a footnote, it is precisely the Federal Communication Commission’s (“FCC”) interpretation of IP telephony as an information service that should guide this proceeding.<sup>2</sup> The FCC has explicitly declined to include any form of IP telephony within its regulations of telecommunications. In doing so, the FCC has taken a hands-off approach to regulating information services regardless of the manner provided. The FCC’s policy follows Congress’ thirty-year practice of

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<sup>2</sup> ILEC Petition at footnote 1 stating that “for the purposes of FCC jurisdiction, [Petitioners] note that the current petition hinges on the interpretation of state, not federal law.”

deregulating the Internet to allow the market to self-regulate and to encourage new technologies to flourish. The FCC has enforced congressional intent codified in the Telecommunications Act of 1996 (the "1996 Act") by not defining VOIP as a regulated "telecommunications service" but as an unregulated "information service."

The origin of the information services classification was the FCC's decisions in the *Computer I* and *Computer II* proceedings, in which the FCC developed the categories of "enhanced service" and "basic service."<sup>3</sup> There the FCC defined "basic service" as the provision of "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."<sup>4</sup> By contrast, enhanced services refer to:

"services, offered over common carrier transmission facilities used in interstate communications which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."<sup>5</sup>

The FCC's goal in creating this new classification was to enhance competition and foster technological development in the computer industry by keeping it free from regulation. The dichotomy established by the FCC in the various *Computer* inquiries was later codified in the 1996 Act, in which basic services are encompassed in the definition

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<sup>3</sup> See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 FCC 2s 267 (1971) ("Computer I"); see also *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) ("Computer II"); see also, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1943*, 11 FCC Rcd 21905 (1996); see also, *In the matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 13 FCC Rcd 11501, Release Number 98-67, (released April 10, 1998), (*Universal Service Report*).

<sup>4</sup> *Computer II* at 420.

<sup>5</sup> *Id.* See also 47 C.F.R. § 64.702.

of “telecommunications” and enhanced services fall within the broader category of “information services.”<sup>6</sup>

New Internet services, such as VOIP, do not automatically fall within the regulatory classification of “telecommunications.” Since establishing the basic/enhanced distinction, the FCC has reviewed new technologies on a case-by-case basis to determine their proper classification. The FCC concluded that IP voice applications fit within the definition of enhanced or information services.<sup>7</sup> In taking a hands-off approach to information services, the Commission found “that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services “via telecommunications.”<sup>8</sup>

The FCC’s *Universal Service Report* to Congress followed a similar rationale when the FCC expressly declined to regulate all VOIP services as telecommunications services. Although the FCC tentatively concluded that “the record before [it] suggest[ed] that certain phone-to-phone services appeared to “lack the characteristics that would render them information services” it did “not believe that it [was] appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings...”<sup>9</sup>. Essentially, the FCC not only refused to differentiate VOIP from any other information service, but it also declined to differentiate phone-to-phone from other types of VOIP services.

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<sup>6</sup> See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd 21905, at para. 103 (1996).

<sup>7</sup> See generally, *Computer I and Computer II, and Universal Service Order*. See also, *Access Charge Reform. Price Cap Performance Review for Local Exchange Carriers: Transport Rate Structure and Pricing End User Common Line Charges*. First Report and Order, 12 FCC Rcd 15982 at para. 50 (released May 16, 1997; see also *Access Charge Reform Order. Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354 at para. 288 (1996).

<sup>8</sup> *Universal Service Report* at para. 13.

<sup>9</sup> *Id.* at para. 83.

**VOIP services are information services that do not fall within the Commission's definition of "transportation companies" within the meaning Alabama Code §37-2-1:**

The ILECs incorrectly assert that VOIP providers are regulated transportation companies under Alabama statutes because VOIP uses telephone lines to offer services.<sup>10</sup> Ala. Code §37-2-1 defines "transportation company" as including "every person not engaged solely in interstate commerce or business that now or may hereafter own, operate, lease manage or control as common carriers or for hire: Any...telephone line." Contrary to the ILEC's position, the use of underlying telephone lines to provide VOIP services is not the decisive factor in determining the regulatory status of VOIP. Rather, §37-2-1 is predicated upon a threshold analysis of whether a company is solely engaged in interstate commerce.

VOIP services are interstate information services pursuant to FCC regulations.<sup>11</sup> Since, like all information services, VOIP splits voice into packets that can travel to any gateway around the world, the jurisdiction of any particular VOIP call is necessarily mixed. Additionally, many VOIP services including phone-to-phone are not tied to a particular geographic location. Accordingly, since VOIP services are interstate in nature, VOIP providers are solely engaged in interstate commerce and therefore excluded from the definition of "transportation company" under Alabama statutes.

Distinguishing between VOIP providers and other ISPs based on their use of telephone lines to provide services creates an arbitrary and unworkable distinction between like information services. By creating separate categories for

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<sup>10</sup> ILEC Petition at 3.

<sup>11</sup> See *Common Carrier Action. FCC Adopts Order Addressing Dial-Up Internet Traffic*, Docket Nos. 96-98, 99-68 (February 25, 1999).

telecommunications and information services in the 1996 Act, Congress drew an express distinction between regulated telecommunications services and unregulated information services in order to bolster growth and development of the nascent advanced services industry. Congress captured this sentiment in the 1996 Act by stating its goals of "promoting competition and reducing regulation in order to secure lower prices and higher quality services ... and encouraging the rapid deployment of new telecommunications technologies."<sup>12</sup> A goal undoubtedly shared by this Commission.

Regulation that differentiates between information services threatens to blur Congress' express distinction between telecommunications and information services. In rejecting this rationale, the FCC reasoned that:

"if we interpreted the [Act] as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category" and that such a finding necessarily contravenes the "strong support in the text and legislative history of the 1996 Act for the view that Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services."<sup>13</sup>

The FCC therefore refused to engage in arbitrary line drawing between different types of information services. Likewise, this Commission should refuse to draw arbitrary distinctions between phone-to-phone VOIP and other information services. Doing otherwise would create disparate treatment of the Internet under the remainder of Alabama regulations and federal statutes that do not regulate information services.

**Providers of VOIP Services Are Exempt From Payment Of Access Charges For The Origination And Termination Of Traffic**

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<sup>12</sup> 47 U.S.C. §§ 151-710.

<sup>13</sup> *Universal Service Report* at para 57.

To the extent that a company provides VOIP, it is eligible for the ISP exemption from payment of carrier access charges. While the ILECs assert that this Commission should require VOIP providers to pay access charges, it is important to note that the FCC has declined to do so in every proceeding where it could have imposed access charges on VOIP services.<sup>14</sup> Most recently, in its Intercarrier Compensation proceeding, the FCC unequivocally confirmed that the existing intercarrier compensation rules “are subject to various exceptions (*e.g.*, long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption).”<sup>15</sup>

Rather than imposing existing access charges on VOIP services, the FCC reaffirmed the need for a more comprehensive evaluation of the issue “based on the more complete records developed in future proceedings.”<sup>16</sup> Likewise, prior to imposing any intrastate access or other charges on VOIP services, this Commission should engage in a comprehensive review of VOIP services on a case-by-case basis. Absent such a review and a definitive determination based on specific service offerings, existing access

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<sup>14</sup> See, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962 (2000) (“CALLS Order”), *aff’d in part, and remanded in part, Texas Office of Public Utilities Counsel et al. v. FCC*, 265 F.3d 313 (5<sup>th</sup> Cir. 2001), *cert. Denied, Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 70 U.S.L.W. 3444 (U.S. Apr. 15, 2002) (“CALLS Decision”); see also, *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (2001); see also, *Multi-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Service of Local Exchange Carriers*, 16 FCC Rcd 19613 (2001) (“MAG Order”); see also, *ISP Remand Order*, 16 FCC Rcd 1951, *rev’d in part on other grounds, WorldCom v. FCC*, 288 F.3d 429 (DC Cir. 2002).

<sup>15</sup> *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, (released April 27, 2001) (“Intercarrier Compensation proceeding”) at para. 6.

<sup>16</sup> *Universal Service Report* at para. 91.



charges as generally applied to VOIP would necessarily be above-cost and only serve to hinder development of this nascent industry.

### **The Commission's Jurisdiction Over VOIP Services May Be Subject To Preemption**

As shown above, VOIP services are interstate in nature and therefore subject to federal law. Any regulation of VOIP also contradicts federal law that maintains all information services free from regulation. Informative in this proceeding is a recent decision from a Federal District Court for Minnesota permanently enjoining the Minnesota Public Utilities Commission ("MPUC") from imposing common carrier regulation on another provider's broadband phone-to-phone VOIP service.<sup>17</sup> The Minnesota Court determined that because Congress has indicated that nascent Internet-based services are to remain unregulated, federal law preempts state authority over such services.<sup>18</sup> The Court further reasoned that any "state regulation would effectively decimate Congress' mandate that the Internet remain unfettered by regulation."<sup>19</sup>

There are also several proceedings pending before the FCC that may have a direct impact on the regulatory treatment of various VOIP services and the Commission's jurisdiction over these services.<sup>20</sup> In light of these pending dockets at the FCC,

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<sup>17</sup> See *Vonage Holdings Corporation, Plaintiff, v. The Minnesota Public Utilities Commission, and Leroy Koppendray, Gregory Scott, Phyllis Reha, and R. Marshall Johnson, in their official capacities as the commissioners of the Minnesota Public Utilities Commission and not as individuals*, Defendants; Civil No. 03-5287 (MJD/JGL); (D Minn.); (October 16, 2003).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2

<sup>20</sup> See *In the Matter of AT&T Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket 02-361, Petition of AT&T (filed Oct. 18, 2002); *Pleading Cycle Established on pulver.com Petition for Declaratory Ruling* FCC Public Notice, DA 03-439 (Feb. 14, 2003); *Revision of the Commission's Rules to ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Further Notice of Proposed Rulemaking* (rel. December 20, 2002) ("911 FNPRM"); Public Notice, DA 03-209 (rel. January 27, 2003) (extending the comment date); *AT&T Petition for Declaratory Ruling on Enhanced Prepaid Calling Card Services*, FCC, Public Notice, DA 03-1896 (June 5, 2003); and *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, WC Docket No. 03-211, DA 03-2952, September 26, 2003.

Net2Phone urges the Commission to refrain from taking any action at this time with regard to phone-to-phone VOIP services in this proceeding.

**Premature Regulation Of VOIP Services Would Have Significant Negative Policy Implications For Alabama**

IP-based communications services are part of an emerging industry that promises to create a wide variety of useful new products and highly effective services for consumers and businesses. It is axiomatic that the imposition of regulation on any industry brings very substantial costs, both in terms of money and time. The Commission should carefully weigh the anticipated benefits of regulating this heretofore-unregulated sector against the demonstrable costs, delays and ultimate competitive impact that such regulation will inevitably bring.

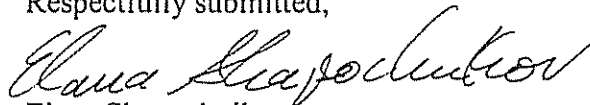
There is also considerable evidence in the public domain that consumers are pleased with the new range of services that IP providers are offering. Although maintaining the unregulated *status quo* with regard to VOIP services would have beneficial effects, changing the *status quo* may hinder competitive development in the state of Alabama.

Moreover, regulation is also not necessary for emerging products because they are subject to market competition. While new, innovative, and efficient IP-based products are continually being developed, in reality they are deployed on a small-scale. Premature regulation could hinder the further development of this fledgling industry and deter competitive entry. In a truly competitive market consumers decide which products and services they want and will make these judgments on a variety of factors.

The future applications of VOIP technologies will remain unlimited only if VOIP is permitted to thrive in an unregulated environment. Meaningfully, the FCC noted that “[w]e can only speculate about the technologies and services that will be offered in the future...” and “[w]e must take care to preserve the vibrant growth of these

technologies.”<sup>21</sup> In order to preserve the vibrant growth of IP, the FCC recognized that regulation “would only restrict innovation in a fast-moving and competitive market.”<sup>22</sup> To force legacy regulations on any form of VOIP would halt its development and prevent consumers from garnering the benefits resulting from choice in their communications services. Such a result would be contrary to both the FCC’s stated policy and Congressional intent to implement the goals of the 1996 Act to establish a “pro-competitive, deregulatory national policy framework” in order to promote technological development for the benefit of consumers.<sup>23</sup>

Respectfully submitted,



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Dated: October 31, 2003

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<sup>21</sup> *Universal Service Report* at para 2.

<sup>22</sup> *Universal Service Report* at para 26, (citing the *Computer II Final Decision*, at 434, para. 129).

<sup>23</sup> 47 U.S.C. §§151 *et seq*